IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA	**:**	**CRIMINAL ACTION**
	:	
vs.	**:**	
	:	
MIGUEL ORTIZ,	**:**	**NO. 11-251-08**
a/k/a "Miguelito,"	**:**	

DuBois, J. **April 25, 2013**

M E M O R A N D U M

I. INTRODUCTION

Defendant is charged in the Fourth Superseding Indictment with, inter alia, conspiracy to distribute five kilograms or more of cocaine, distribution of five kilograms or more of cocaine, and engaging in monetary transactions in property derived from specified unlawful activity. Trial began on April 9, 2013. Prior to trial defendant moved to preclude the Government from introducing at trial evidence pertaining to seizures of cocaine and money in June 2010. A hearing on the Motion was held on April 4, 5 and 8, 2013. At the conclusion of the hearing on April 8, 2013, the Court granted in part and denied in part defendant's Motion. This Memorandum serves to amplify the Court's rulings.

II. BACKGROUND

The facts of this case have been set forth in several of the Court's prior opinions. See United States v. Ortiz, 2013 WL 247226 (E.D. Pa. Jan. 23, 2013); United States v. Ortiz, 2013 WL 101727 (E.D. Pa. Jan. 7, 2013); United States v. Ortiz, 878 F. Supp. 2d 515 (E.D. Pa. 2012). Accordingly, the Court recites in this Memorandum only those facts necessary to explain the Court's rulings on defendant's Motion.

On June 6, 2010, Missouri State Highway patrol stopped a tractor trailer in Springfield, Missouri and seized 75 kilograms of cocaine. (Resp. at 2.) Further investigation revealed that the cocaine was intended for delivery in Philadelphia, Pennsylvania. A team of DEA agents then made a "controlled delivery" of "sham cocaine" (the real cocaine was removed by the DEA) in Philadelphia on June 8, 2010. (Id.) In the course of the delivery, a party identified by the Government as "Cooperating Witness-3" ("CW-3") placed three duffle bags in the tractor trailer and retrieved the "sham" cocaine. The bags which CW-3 placed in the tractor trailer contained $2.1 million in cash.[1] (Letter from Government dated April 8, 2013, at 1 n.1.)

At the hearings of April 4 and 5, 2013, Special Agent David Pedrini of the DEA testified that on March 11, 2013, he had a conversation with another cooperating witness ("CW-4") in which CW-4 stated that he had heard that the cocaine seized in June 2010 was supplied by defendant. (Motions Hearing, April 4, 2013, at 45-46) ("H1.") The Government then conducted a proffer session with CW-4 on March 15, 2013, during which CW-4 repeated and expanded on his original statement. (Id.) On March 22, 2013, the Government had a proffer session with another cooperating witness ("CW-5"), who stated defendant had supplied him with cocaine. (Motions Hearing, April 5, 2013, at 33) ("H2.") CW-5 viewed photographs of the cocaine seized in June 2010 and said that it was packaged in a fashion similar to the cocaine he had previously received from defendant. (H1 at 53-54.)

The Government also presented drug "tally sheets" which showed that defendant was paid approximately $1.9 million in drug proceeds by alleged co-conspirators in the days leading

1 In its Response, the Government stated that $2.4 million had been seized during the controlled delivery. A Letter from the Government dated April 8, 2013 clarified that $2.1 million was seized during the controlled delivery on June 8, 2010 and another $300,000 was seized from a "public storage facility" that same day. The Government moves to admit only the $2.1 million seized in the controlled delivery.

up to the June 2010 seizures.[2] (Motions Hearing, April 8, 2013, at 18) ("H3.") Finally, the Government proffered that CW-5 would testify that he had a conversation with defendant regarding the June 2010 seizures, in which defendant stated that, because of the seizures, he needed to "take it easy," and as a consequence defendant did not supply CW-5 with cocaine for several months after the June 2010 seizures. (H2 at 5.)

III. DISCUSSION

Defendant seeks to preclude the evidence relating to the June 2010 seizures on multiple grounds: (1) that admission of such evidence would constructively amend the Fourth Superseding Indictment, (2) that the late disclosure of the evidence prejudiced his preparation for trial, and (3) that the evidence is impermissibly tainted by previously suppressed evidence. These issues are addressed in turn.

A. Constructive Amendment

First, defendant claims that because the June 2010 seizures and evidence stemming from those seizures were not described in the Fourth Superseding Indictment, admission of such evidence at trial would constructively amend the Fourth Superseding Indictment. "An indictment is constructively amended when evidence, arguments, or the district court's jury instructions effectively amend[s] the indictment by broadening the possible bases for conviction from that which appeared in the indictment . . . A constructive amendment of the charges against a defendant deprives the defendant of his/her substantial right to be tried only on charges presented in an indictment returned by a grand jury." United States v. McKee, 506 F.3d 225,

2 Special Agent Pedrini testified that the payments to defendant totaled $1.8 million. (H1 at 58.) However, the Government presented in its additional briefing the alleged amount of each payment to defendant, totaling $1.9 million, and stated the same total in the hearing on April 8, 2013. The Court finds that any difference in alleged total payment to defendant is not material.

229 (3d Cir. 2007). A constructive amendment constitutes a per se Fifth Amendment violation. Id.

Where defendant is charged with conspiracy to distribute drugs, constructive amendment does not result simply because the government presents evidence at trial related to acts and co-conspirators not mentioned in the indictment. See United States v. Lazarre, 414 F. App'x 254, 257-58 (11th Cir. 2011) (finding no constructive amendment of § 846 conspiracy charge where co-conspirator "was not named specifically in the indictment [as such evidence] does not alter an essential element of the conspiracy because the indictment also included 'other persons known and unknown' and an agreement between [co-conspirator] and [defendant] was plain from the evidence"); United States v. Arthur, 80 F. App'x 726, 728-29 (2d Cir. 2003) (finding no amendment of drug conspiracy count because evidence at trial from conspirator unnamed in indictment, "was consistent with the indictment, which charged [defendant] with conspiring with 'others known and unknown' to distribute a kilogram and more of heroin.").

In this case, the Fourth Superseding Indictment charges that between the Fall of 2008 and on or about March 30, 2011, defendant conspired with several named co-conspirators, "and with others known and unknown to the grand jury," to distribute five kilograms or more of cocaine. The June 2010 evidence of cocaine and alleged drug proceeds is consistent with the language of the Fourth Superseding Indictment. Accordingly, at the hearing of April 5, 2013, the Court ruled that the June 2010 evidence does not constitute a constructive amendment of the Fourth Superseding Indictment.

B. Variance

At the April 5, 2013 hearing the Court ordered the parties to present additional briefing on the issue of whether the June 2010 evidence constituted an impermissible variance. Even

where there is no constructive amendment, "a variance may exist if the evidence at trial proves facts different from those alleged in the indictment. The evil of a variance is that defendants may be deprived of notice of the charges against them and may be subject to double jeopardy . . . [variances] are examined on a case-by-case basis and constitute reversible error only if the defendant was prejudiced." United States v. Smith, 789 F.2d 196, 200 (3d Cir. 1986). "Where a single conspiracy is alleged in an indictment, and the evidence at trial merely proves the existence of several distinct conspiracies, there is an impermissible variance. On the other hand, a finding of a master conspiracy with subschemes does not constitute a finding of multiple, unrelated conspiracies and, therefore, would not create an impermissible variance." United States v. Lee, 359 F.3d 194, 207 (3d Cir. 2004).

In its supplemental briefing, the Government stated that it would not argue at trial that the 75 kilograms of cocaine seized in June 2010 were part of the conspiracy charged in the Fourth Superseding Indictment. Instead, the Government advised that it would seek to admit the cocaine as evidence of other bad acts under Rule 404(b). With respect to the cash seized in June 2010, the Government argued that it was intrinsic evidence that was part of the charged conspiracy. Each type of evidence is addressed in turn.

1. Cash Seized in June 2010

First, the Government argues that the cash seized in June 2010 is admissible as evidence intrinsic to the charged conspiracy, and therefore not subject to the requirements of Rule 404(b). See United States v. Green, 617 F.3d 233, 245 (3d Cir. 2010). To determine if such evidence is intrinsic, it must fall into two "narrow" categories: first, "evidence is intrinsic if it directly proves the charged offense"; second, "uncharged acts performed contemporaneously with the charged crime may be termed intrinsic if they facilitate the commission of the charged crime." Id. at 248.

In the context of a conspiracy, "acts are intrinsic when they directly prove the charged conspiracy." United States v. Cross, 308 F.3d 308, 320 (3d Cir. 2002); see also Green, 617 F.3d at 248.

The Government claims that the cash seized in June 2010 directly proves the charged conspiracy for three reasons. First, the Government alleges that certain drug "tally sheets" show that in the days preceding the June 2010 seizure of cash, several large payments were made to defendant for previous cocaine deliveries, totaling approximately $1.9 million dollars. As the cash seized in the June 2010 controlled delivery totaled $2.1 million dollars, the Government contends that the similar amounts of cash support a finding that the seized cash was money paid to defendant as part of the charged conspiracy. Second, the Government proffered that a cooperating witness would testify that he had a conversation with the defendant in which the defendant made reference to the June 2010 seizure and stated that he needed to "take it easy" as a consequence. Third, the Government averred that the same cooperating witness, who had previously been supplied with cocaine by defendant, had to utilize a different source of cocaine in the months following the June 2010 seizure, because the defendant stopped supplying him with cocaine during that time. The Government therefore argues that there is sufficient evidence to allow the jury to find that the cash seized in June 2010 was defendant's, and that such cash directly proves the conspiracy charged in the Fourth Superseding Indictment.

The Court agrees with the Government on this issue. The foregoing evidence presented by the Government is sufficient to establish that the cash seized in June 2010 was part of the conspiracy charged in the Fourth Superseding Indictment. The seized cash therefore does not present a variance issue. It is intrinsic evidence, also relevant under Rule 401, and its probative value is not substantially outweighed by the danger of unfair prejudice under Rule 403. The

Court thus concludes that evidence pertaining to the cash seized in June 2010 is admissible against defendant as direct evidence of the charged conspiracy.

2. Cocaine Seized in June 2010

The Government next argues that the 75 kilograms of cocaine seized in June 2010 should be admitted as evidence of other bad acts of the defendant, pursuant to Rule 404(b). At the hearing on April 5, 2013, the Government presented testimony that the seized cocaine was not being purchased with the seized cash, but rather that the cash was meant as payment for prior shipments of cocaine, and the seized cocaine was essentially being provided in the expectation of future payment. (H2 at 42.) Further, Special Agent Pedrini stated that he did not believe that the seized cocaine was intended for the drug trafficking organization described in the Fourth Superseding Indictment. (H1 at 78.) Accordingly, the Government states that it will not argue at trial that the seized cocaine was part of the charged conspiracy. Instead, the Government takes the position that the seized cocaine should be admitted under Rule 404(b) to, inter alia, provide background information regarding the seizure of the cash.

Rule 404(b) generally prohibits the admission of evidence of past convictions as propensity evidence: "(1) Prohibited Uses. Evidence of a crime, wrong, or other act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." However, "[t]his evidence may be admissible for another purpose, such as proving motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake, or lack of accident." Fed.R.Evid. 404(b)(2). In the Third Circuit, courts employ the following four-part test to evaluate the admissibility of evidence under Rule 404(b): "Evidence of uncharged crimes or wrongs must (1) have a proper evidentiary purpose; (2) be relevant; (3) satisfy Rule 403; and (4) be accompanied by a limiting instruction (where

requested) about the purpose for which the jury may consider it." United States v. Green, 617 F.3d 233, 249 (3d Cir. 2010).

Rule 403 bars the introduction of evidence where its "probative value is substantially outweighed by the danger of unfair prejudice." Several factors are relevant in the weighing process, including: (1) the need for the evidence in light of the contested issues and the other evidence available to the prosecution, (2) the strength of the evidence in proving the issue, and (3) the danger the evidence will inflame the jury and lead to a decision on an improper basis. United States v. Sriyuth, 98 F.3d 739, 748 (3d Cir. 1996).

The Court concludes that the cocaine seized in June 2010 is relevant under Rule 401, and has a proper evidentiary purpose under Rule 404(b). Evidence that defendant supplied the cocaine seized in June 2010 would be "helpful background information to the finder of fact." See United States v. Green, 617 F.3d 233, 250 (3d Cir. 2010). This is a non-propensity basis for admission under Rule 404(b). Id.

The Court nevertheless concludes that the cocaine seized in June 2010 is barred under Rule 403, under the relevant Sriyuth factors. First, the government does not have a strong need to admit the seized cocaine, as it has substantial evidence which may be used to establish its case. For example, the Government has available for use at trial, inter alia, testimony from a number of co-conspirators, testimony from law enforcement officials, video surveillance, drug "tally sheets," and telephone records. Next, the seized cocaine also creates a substantial danger that "the evidence will inflame the jury and lead to a decision on an improper basis." See Sriyuth, 98 F.3d at 748. Specifically, admission of the seized cocaine would create "'inevitable pressure on lay jurors to believe that if he did it before he probably did so this time.'" United States v. Cherry, 2010 WL 3156529, at *6 (E.D. Pa. Aug. 10, 2010) (quoting Gordon v. United

States, 383 F.2d 936, 940 (D.C. Cir. 1967)). For the foregoing reasons, the Court rules pursuant to Rule 403 that the probative value of the evidence relating to the cocaine seized in June 2010 is substantially outweighed by the danger of unfair prejudice.

C. Late Disclosure

Next, defendant argues that he is prejudiced by the late disclosure of the cash seized in June 2010. Specifically, defendant contends that he cannot thoroughly investigate such evidence prior to trial, and that the evidence should accordingly be suppressed. The Court disagrees.

In considering whether to suppress government evidence due to a discovery violation by the Government in a criminal trial, courts may consider several factors: (1) whether the Government acted in bad faith, (2) the extent of prejudice to the defendant, and (3) whether any prejudice can be cured by a less severe remedy, such as a continuance. See e.g. United States v. Starusko, 729 F.2d 256, 262 (3d Cir. 1984); see also U.S. v. Ganier, 468 F.3d 920, 927 (6th Cir. 2006).

Defendant does not assert that the Government engaged in a discovery violation by failing to disclose Brady material, expert reports, or otherwise failing to promptly disclose evidence pursuant to Fed. R. Crim. Pro. 16(c). On this issue the Government states that it turned over all relevant documents pertaining to the June 2010 seizures shortly after it learned about the link between defendant and those seizures. Further, defendant has made no allegation of bad faith on the part of the Government, and the Court finds no evidence of bad faith. Finally, the Court concludes that defendant has not established any prejudice by the admission of this evidence that could not be cured with a less severe sanction, such as a continuance. On the latter issue the Court stated it would consider a continuance of the trial so as to give defendant an opportunity to conduct additional investigation. Defendant rejected any such continuance and

stated that he wanted to proceed to trial. Accordingly, defendant's Motion is denied on the ground of late disclosure.

D. Taint

Finally, defendant argues that the Government only discovered the testimony linking defendant to the cash seized in June 2010 by use of previously suppressed evidence. By Order dated July 20, 2012, this Court granted defendant's Motion to Suppress Evidence, concluding that the use of warrantless GPS trackers on defendant's car constituted a Fourth Amendment violation. The suppressed evidence included, inter alia, approximately $2.3 million in cash allegedly connected to defendant. Defendant argues that the suppressed GPS evidence was used to link defendant to the June 2010 evidence, impermissibly tainting the June, 2010 evidence as a "fruit of the poisonous tree."

Evidence obtained as a result of a Fourth Amendment violation ordinarily must be suppressed as "fruit of the poisonous tree." See Wong Sun v. United States, 371 U.S. 471, 487-88 (1963). "[T]he scope of the exclusionary rule is determined by 'whether, granting establishment of the primary illegality, the evidence to which objection is made has come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.'" United States v. Burton, 288 F.3d 91, 99 (3d Cir. 2002) (quoting Wong Sun, 371 U.S. at 488) (ellipsis omitted); see also United States v. Perez, 280 F.3d 318, 338 (3d Cir.2002) ("[E]vidence is not to be excluded if the connection between the illegal police conduct and the discovery and seizure of the evidence is so attenuated as to dissipate the taint."). Thus, "the independent source doctrine serves as an exception to the exclusionary rule and permits the introduction of 'evidence initially discovered during, or as a consequence of, an unlawful search, but later obtained independently from activities untainted by the initial illegality.'" United States

v. Price, 558 F.3d 270, 281 (3d Cir. 2009) (quoting Murray v. United States, 487 U.S. 533, 537 (1988)). "So long as a later, lawful seizure is genuinely independent of an earlier, tainted one . . . there is no reason why the independent source doctrine should not apply." Murray v. United States, 487 U.S. 533, 542 (1988).

Defendant argues that Special Agent Pedrini asked CW-4 about the June, 2010 evidence because of possible similarities between that evidence and the suppressed GPS evidence, thus tainting any link to defendant. The Court rejects this argument. The Court credits Special Agent Pedrini's testimony, which established that on March 11, 2013 he asked CW-4 about the June 2010 seizures, "because [they] were talking about [CW-4's] cousin," who is not connected to this case, and his involvement in the June 2010 seizures. (H2 at 31.) According to Special Agent Pedrini, CW-4 then "volunteered the information that [CW-4] also heard that the line of cocaine that was delivered [in June 2010] . . . was Miguel Ortiz's line of cocaine." (Id. at 32.) Special Agent Pedrini testified that was the first time he connected defendant to the June 2010 seizures. (Id. at 33.)

At the April 8, 2013 hearing defendant also asserted that the Government had received information similar to that disclosed by CW-4 at proffer sessions with other cooperating witnesses in 2011 and 2012, which included the use of suppressed GPS evidence, thus tainting any link between defendant and the June 2010 seizures. The Court rejects this argument. The Court finds that the Government did not link defendant to the June 2010 seizures until the March 11, 2013 conversation with CW-4, as established by the fact that immediately after that conversation the Government began investigating the June 2010 seizure as it potentially related to defendant, and conducted multiple proffer sessions on that issue shortly thereafter.

At no point during the March 11, 2013 conversation with CW-4 or subsequent proffer sessions with CW-4 and CW-5 was the suppressed GPS evidence mentioned or used in any way to connect defendant to the June 2010 evidence. (See H2 at 33.) The Court concludes that the Government has shown by a preponderance of the evidence that the conversation with CW-4 on March 11, 2013 constitutes an independent source of information connecting defendant to the June 2010 seizures, such that the cash seized in June 2010 and its alleged link to defendant have not been tainted by the suppressed GPS evidence. See S.E.C. v. Lazare Indus. Inc., 294 F. App'x 711, 715 n.3 (3d Cir. 2008) (noting that, "Even in criminal cases . . . the government need only prove an independent source by a preponderance of the evidence."). Thus, defendant's Motion on this ground is denied.

IV. CONCLUSION

For the foregoing reasons, the Court rules that the money seized in the June 2010 controlled delivery is admissible in evidence against defendant, but the seized cocaine is barred pursuant to Rule 403. Defendant's Motion is accordingly granted in part and denied in part. An appropriate order follows.

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a/k/a "Miguelito,"	**:**	

O R D E R

AND NOW, this 25th day of April, 2013, upon consideration of Defendant's Motion in Limine for a Pretrial Ruling on the Inadmissability of Documents (Bates Nos. 2044-2131) and the Subject Matter Referred To Therein (Document No. 389, filed March 18, 2013), Government's Response and Memorandum of Law, in Opposition to Defendant's Motion in Limine to Exclude Evidence of 2010 Stop and Seizure in Missouri (Document No. 398, filed March 22, 2013), Defendant's Motion to Effectuate the Court's July 20, 2012 Opinion Suppressing the Fruits of Unlawful Search (Document No. 401, filed March 25, 2013), Letter from the Government dated April 8, 2013, and Letter from the Defendant dated April 8, 2013 (Document No. 418, filed April 8, 2013), following a hearing on April 4, 5, and 8, 2013, with defendant and all counsel present, for the reasons stated in the Memorandum of April 25, 2013,

IT IS ORDERED as follows:

1. Defendant's Motion to Effectuate the Court's July 20, 2012 Opinion Suppressing the Fruits of Unlawful Search, in which defendant requested a hearing on that issue, is **GRANTED**. The Court conducted the hearing sought by the Motion on April 4, 5, and 8, 2013.

2. That part of Defendant's Motion in Limine for a Pretrial Ruling on the Inadmissability of Documents (Bates Nos. 2044-2131) and the Subject Matter Referred To

Therein, which seeks to preclude evidence related to cash seized from a tractor trailer[3] in June 2010, is **DENIED**.

3. That part of Defendant's Motion in Limine for a Pretrial Ruling on the Inadmissability of Documents (Bates Nos. 2044-2131) and the Subject Matter Referred To Therein, which seeks to preclude evidence related to cocaine seized from a tractor trailer in June 2010, is **GRANTED**. A hearing was conducted on April 4, 5 and 8, 2013 and the Court ruled from the bench on April 8, 2013. The attached Memorandum dated April 25, 2013 amplifies that ruling.

BY THE COURT:

/s/ Hon. Jan E. DuBois

DuBOIS, JAN E., J.

3 The Government proffered that $300,000 in cash was seized from a public storage facility, but that they would only seek to admit evidence regarding the approximately $2.1 million in cash seized from the tractor trailer.